No. 3

IN THE

Supreme Court of the United States

October Term, 1943.

A. M. ANDERSON, Receiver of the National Bank of Kentucky, of Louisville, - Petitioner,

versus

KATHERINE KIRKPATRICK ABBOTT, Administratrix, Et Al., - - - Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS ON THE REARGUMENT OF THE CASE.

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Louisville, Kentucky,
December 31, 1943.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, - *Petitioner,*

v.

KATHERINE KIRKPATRICK ABBOTT, ADMINISTRATRIX, ET AL., - - - - - *Respondents.*

SUPPLEMENTAL BRIEF FOR RESPONDENTS ON THE REARGUMENT OF THE CASE.

The ultimate question in this case is whether or not the ends of justice require that the corporate personality of the BancoKentucky Company be ignored in order that petitioner, as Receiver of the National Bank of Kentucky, may collect from the shareholders of the Company the unsatisfied balance of a judgment heretofore recovered by him against the Company itself as the real owner of the same bank shares involved in the case at bar.

The answer to that question is indicated in a group of cases decided subsequent to 1931, in which the courts were called upon to clear away the wreckage left by the financial storm of 1929-1935. They were called upon to allocate the responsibility for losses resulting from the collapse of financial structures of a novel kind, of which no exact examples were to be found in the earlier cases, and to apply the established principles of law and equity to the new situations presented in these cases.

In these cases there was developed the principle that the ends of justice may permit the disregard of ordinary legal relationships in cases where the stockholders of a failing institution have attempted to use the corporate device to evade threatened liability, and where the corporation so used has no other substantial assets than the bank shares transferred to it and no other function than to act as a receptacle for those shares. In such cases the corporate personality of corporations of this kind has sometimes been disregarded. In the instant case both courts below found that none of the elements justifying such disregard existed in the case of the BancoKentucky Company.

Petitioner's "Reply Brief" was filed in the Clerk's office on February 8, 1943, the day on which the case was first argued, and consequently counsel for respondents had had no opportunity to consider the contents of that brief or to make reply thereto before the case was first submitted.

Petitioner, in his reply brief, has cited and relied upon forty-three cases, in addition to the twenty-five

cases cited in his original brief, so that we now have sixty-eight citations in support of petitioner's argument.

None of these cases supports petitioner's right to recover under the facts disclosed in this case and the great majority of them are relied upon to support contentions whose validity respondents have never challenged.

We have never denied that the real owner of bank shares, though not so registered, was liable for an assessment against those shares.*

We have never denied that the record holder of bank shares, though not the real owner, was liable for an assessment against those shares.†

We have never denied that both the real owner and the record holder of bank shares, when not the same person, might be sued, jointly or successively, to recover such an assessment.‡

We have never denied that a corporation which is subject to the regulatory provisions of the Sherman Act or of the Hepburn Act can not evade its provisions

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*Petitioner's Citations: *Germania National Bank* v. *Case*, 99 U. S. 628, 5 L. Ed. 448; *Bowden* v. *Johnson*, 107 U. S. 25, 27 L. Ed. 396; *Pauly* v. *State Loan*, 165 U. S. 606, 41 L. Ed. 844; *Stuart* v. *Hayden*, 169 U. S. 1, 42 L. Ed. 639; *Christopher* v. *Norvell*, 201 U. S. 216, 50 L. Ed. 732; *McDonald* v. *Dewey*, 202 U. S. 510, 50 L. Ed. 1128; *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162, 51 L. Ed. 423; *Early* v. *Richardson*, 280 U. S. 496, 74 L. Ed. 575; *English* v. *Gamble*, 26 Fed. (2d) 28.

†Petitioner's Citations: *Irvine* v. *Blackburn*, 205 Fed. 217; *Broderick* v. *Aaron*, 151 Misc. 518, 272 N. Y. Supp. 219.

‡Petitioner's Citations: *Metropolitan Holding Co.* v. *Snyder*, 79 Fed. (2d) 263; *Continental National Bank* v. *O'Neil*, 82 Fed. (2d) 650; *Ericson* v. *Slomer*, 94 Fed. (2d) 437; *Reconstruction Finance Corporation* v. *Pelts*, 125 Fed. (2d) 803; *Reconstruction Finance Corporation* v. *Barrett*, 131 Fed. (2d) 745; *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25.

by transferring a part of its property or business to a corporation of which it is the sole stockholder.*

We have never denied that the stockholders of a corporation to which they have transferred bank shares in exchange for the shares of that corporation, may be liable to assessment as the real owners of those bank shares, in cases where the bank shares are the only asset, or substantially the only asset, of the holding corporation and the corporation has no other function than to act as a depositary for those shares and there is evidence of an attempt to evade liability.†

With the exception of fourteen cases on the subject of *res judicata* or election, the facts in the cases cited by petitioner bring those cases within one or the other of the doctrines stated above.

It is true petitioner says (Brief, page 49; Reply Brief, page 18) that in *Deming* v. *Schram, supra,* "$7,500,000 of really new money went into that bank stock holding company." But this statement is inaccurate. The $7,500,000 referred to did *not* go into "that bank stock holding company." The *Deming Case* involved the liability of the stockholders of the

*Petitioner's Citations: *Northern Securities Co.* v. *United States*, 193 U. S. 197, 48 L. Ed. 679; *United States* v. *Lehigh Valley RR. Co.*, 220 U. S. 257, 55 L. Ed. 458; *United States, Delaware, Lackawanna and Western Railroad Co.*, 238 U. S. 516, 59 L. Ed. 1438.

†Petitioner's Citations: *Corker* v. *Soper*, 53 Fed. (2d) 190; *Deming, et al.*, v. *Schram*, 7 F. Supp. 271; *O'Keefe* v. *Pearson*, 73 Fed. (2d) 673; *Schiener* v. *Davis*, 75 Fed. (2d) 371; *Fors* v. *Farrell, et al.*, 271 Mich. 358, 270 N. W. 856; *Barbour* v. *Thomas*, 86 Fed. (2d) 510; *Brusselback, et al.*, v. *Cago Corporation, et al.*, 85 Fed. (2d) 20; *Durrance* v. *Collier*, 81 Fed. (2d) 4; *White* v. *Aaronson*, 169 Misc. 593, 7 N. Y. S. (2d) 901; *Hansen, Supervisor of Banking* v. *Agnew, et al.*, 195 Wash. 354, 80 Pac. (2d) 845; *Partridge, et al.*, v. *Ainley, et al.*, 28 F. Supp. 472; *Bacon* v. *Barker*, 110 Vt. 280, 6 Atl. (2d) 9; *Galinski* v. *Adler*, 302 Ill. App. 474; 24 N. E. (2d) 205; *Flanagan* v. *Madison Square State Bank*, 302 Ill. App. 468; 24 N. E. (2d) 202; *Nettles* v. *Sottile*, 191 S. E. 796; *Nettles* v. *Rhett*, 94 Fed. (2d) 42.

Guardian Detroit Group, Inc., a Michigan corporation (later called the Guardian Detroit Union Group, Inc.), for a comptroller's assessment against the shares of the Guardian National Bank of Commerce, all of whose shares were held by the Guardian Detroit Group. There had been in Detroit another and older bank stock holding company, the Union Commerce Corporation, a Delaware corporation which, prior to the organization of the Guardian Detroit Group, had sold to its stockholders, out of an increase in its capital, 25,000 shares at $300 per share, or $7,500,000, with which it purchased other bank shares. Subsequently, the Guardian Detroit Group was incorporated (May 9, 1929) and before the year was out it had absorbed the Union Commerce Corporation by exchanging its shares for all the stock holdings of the Union Commerce Corporation. That corporation was then dissolved, after distributing to its stockholders cash amounting to five cents per share and 733,695 shares of the Guardian Union Group.

(The foregoing facts are taken from plaintiff's Exhibit 211, Vol. 5, p. 2171.)

It thus appears that "$7,500,000 of really new money" did not go into the holding company whose stockholders were held liable in the *Deming Case*.

The question of "real ownership" has never been determined merely by the fact that the corporation has no assets other than bank stocks or by the fact that the corporation at some later date became insolvent. Such facts where they exist may be considered as evidence of an initial purpose to evade liability, but they

are never conclusive of such purpose. *Burrows* v. *Emery*, 285 Mich. 86, 280 N. W. 120; *Pearson* v. *All Borg*, 23 F. Supp. 837; *Nettles* v. *Childs*, 100 Fed. (2d) 952.

In the last analysis, petitioner's claim is that the stockholders of the BancoKentucky Company, and not BancoKentucky Company itself, were the real owners of the stock of the National Bank of Kentucky because the BancoKentucky Company was organized for the purpose of evading the statutory liability and had no substantial assets except bank stocks and that consequently it must be regarded as a mere agency or instrumentality of the real owners of the stock of the National Bank of Kentucky.

This contention is contradicted by both courts which heard and decided, in favor of petitioner, the suit brought by him to recover from the BancoKentucky Company the amount of the Comptroller's assessment involved in the case at bar. In *Keyes* v. *American Life and Accident Insurance Co.*, 1 F. Supp. 512, 515, Judge Cochran of the United States District Court for the Eastern District of Kentucky found:

> "That the BancoKentucky Company, and the defendant, Joseph S. Laurent, its Receiver, was the actual and real owner of 37,721.624 shares of the stock of the National Bank of Kentucky, having a par value of $100 per share on November 17, 1930."

On appeal from Judge Cochran's decision, the Circuit Court of Appeals for the Sixth Circuit, in affirming the judgment, said:

"The assessment of double liability was made against Banco upon the theory that, being the holder of Trustee's Participation Certificates issued under a trust agreement dated April 22, 1927, it was the real and beneficial owner of national bank stock." * * * "The evidence establishes that Banco was in every sense the true and beneficial owner of the national bank stock involved." (Laurent v. Anderson, 70 F. (2d) 819, 820, 824.)

The *Laurent Case* has been cited by the courts as holding that the "real owner" of bank shares, though not so registered, is liable for a Comptroller's assessment, in eight of petitioner's "real owner" cases, to-wit: *Deming* v. *Schram*, 7 F. Supp. 271; *Hansen* v. *Agnew*, 195 Wash. 354, 80 Pac. (2d) 845; *Bacon* v. *Barker*, 110 Vt. 280, 6 Atl. (2d) 9; *Nettles* v. *Sottile*, 184 So. Car. 1, 191 S. E. 796; *Nettles* v. *Rhett*, 94 Fed. (2d) 42; *Continental National Bank and Trust Co.* v. *O'Neil*, 82 F. (2d) 650; *BancoKentucky's Receiver* v. *Louisville Trust Co.'s Receiver*, 263 Ky. 185, 92 S. W. (2d) 19, and *Pearson* v. *All Borg*, 23 F. Supp. 857. With two exceptions, these were cases in which the stockholders of a holding company for one or more of the reasons stated above, were held liable for an assessment on the ground that they were the real owners of the bank stock held by the company. The exceptions were *Continental National Bank and Trust Co.* v. *O'Neil, supra,* and *Bacon* v. *Barker, supra,* in both of which the remainderman in a trust estate was held liable for an assessment on bank stock held by the trustee. In the *Continental National Bank Case,* the

court said expressly that in the *Laurent Case* the BancoKentucky Company was held liable "because it was the real owner" of the bank stock upon which the assessment had been levied.

We submit that the instant case is clearly distinguished from all of petitioner's authorities by a controlling difference in the facts. That the BancoKentucky Company was not organized as a device for escaping liability on bank stock or for the exclusive or primary purpose of holding bank stock is amply shown by the record.

Petitioner's contention is also contradicted by both courts below in the instant case. The District Court made the following findings (R., Vol. I, pp. 255, 266, 267):

> "19. Banco was established for its avowed purposes, with no thought on the part of any of its organizers of avoiding double liability on their Banco shares."
>
> "61. Banco was organized in good faith."
>
> "62. Banco was certainly not a sham."
>
> "63. Banco was not organized for a fraudulent purpose or to conceal secret or sinister enterprises conducted for the benefit of the Bank."
>
> "64. Banco was not a mere holding company."
>
> "65. Banco was formed for the purposes set out in the letter of July 19, 1929, and for no other purpose."
>
> "66. Banco was not formed as a medium or agency through which to avoid double liability on the stock of the bank."

The District Court also made the following conclusions of law:

> "9. Banco was the true, legal and beneficial owner of the stock of the bank."
>
> "10. The transfers of the T. P. C.'s to Banco were out and out transfers, and Banco, therefore, acquired full legal title thereto."
>
> "11. The stockholders of Banco were not stockholders of the bank within the meaning of the statute."

The Circuit Court of Appeals, in the instant case (127 Fed. (2d) 696, 697), made the following statement:

> "The merger and unification of control and management of the National Bank of Kentucky and the Louisville Trust Company through the issuance of trustees' participation certificates, the terms and conditions upon which the certificates were issued, the organization of BancoKentucky Company and the underlying purposes thereof, and the acquisition by Banco of the trustees' participation certificates have been described and discussed, not only in the published opinion of the court below (32 F. Supp. 328) and in Laurent v. Anderson, *supra*, but also in Anderson v. Akers, D. C. Ky., 7 F. Supp. 924, 947, *et seq.*; and on appeal therefrom, in Atherton v. Anderson, 6 Cir., 86 F. 2d 518, 534, *et seq.*"

After a review of the facts shown by the record, the Court stated its conclusion as follows (*idem.* p. 701):

"From our study of the record in this case, we are in accord with the conclusions of the district court that the BancoKentucky Company was not a mere holding company, a sham corporation, or an empty shell; but was a very real and live corporate entity, actively acquiring capital assets; that the corporation was organized for the purposes set out in its prospectus of July 19, 1929, and for no other; that it was conceived in no planned avoidance of double liability assessment upon stock of the National Bank of Kentucky; that the BancoKentucky Company was the true, legal and beneficial owner of the national bank stock; and that its stockholders were not stockholders of the national bank within the meaning of the federal assessment statutes. 38 Stat. 273, 12 U. S. C. A. 64."

These concurrent findings of fact by the courts below will, we assume, be accepted by this Court, leaving for consideration only the question of law whether or not, in the circumstances thus shown, the petitioner has made out a case of liability on the part of respondents. But since petitioner has challenged the validity of those findings (Petition for Rehearing, R. 3, pp. 327-353), we offer at this point a statement of certain salient facts shown by the record, upon which those findings were based.

BANCO'S ORIGIN AND HISTORY.

The persons who were directors of the National Bank of Kentucky and the Louisville Trust Company were the organizers of BancoKentucky Company. The purposes which they had in view and the means proposed for carrying those purposes into effect were set out in a letter of July 19, 1929, usually called the "Prospectus" in this record. That letter was addressed by them to all holders of Trustee's Participation Certificates and mailed to them on that date. In the third literary paragraph of that letter it was predicted that "the new corporation will not only greatly benefit the two banks and the territory they now serve, but will also be a stabilizing influence in banking circles throughout this section of the country" (R. 1, p. 253).

> "The new corporation can exercise many profitable and important functions which neither a bank nor a trust company has authority to exercise, and can take advantage of many sound and profitable financial opportunities presented in the course of business of the two banks but not available to them, because of the restrictions upon their powers and activities." (*Idem.*)

In paragraph 6 of the Prospectus, the activities of the new corporation were described thus:

> "To underwrite securities and take part in syndicate management, and to charge fees and commissions for its services in connection with the reorganization and financing of other corpora-

tions; the power to issue bonds and to guarantee the obligations of others, to become surety, guarantor, and endorser thereof."

The structure of the new corporation is thus described in paragraph 5 of the Prospectus:

> "The stock will be exchanged or sold in accordance with this Plan, on the basis of Twenty-Five Dollars ($25.00) per share, which will give the Company a capital of Twenty Million Dollars ($20,000,000) and a surplus of Thirty Million Dollars ($30,000,000) or a total capital and surplus of Fifty Million Dollars ($50,000,000). No stock shall be sold by the Company at less than Twenty-Five Dollars ($25.00) per share."

In paragraph 8 of the Prospectus it was declared that the entire plan "was conditioned expressly upon the acquisition by the BancoKentucky Company of at least a majority of the Trustee's Participation Shares issued and outstanding as of September 19, 1929."

In the Courier-Journal of Louisville there appeared on July 20, 1929, an announcement of which the following excerpts are illustrative:

* * * * *

> "The plan brings to Louisville an entirely new organization, it was said. It makes Louisville, its business and industries, independent in any field of operation they may choose, the officials asserted. Business and industrial leaders of Louisville will be able to finance their enterprises without seeking outside help and without being subject to the restraints that might be imposed by organizations

not entirely devoted to Louisville and this section of the country, it was pointed out. A statement was put in the mails Friday night addressed to the holders of trustee's participation shares, National Bank of Kentucky and the Louisville Trust Company."

* * * * * *

"Such a re-organization is in line with the trend of business and finance in this country; and the strength and influence of the new corporation will not only greatly benefit the two banks and the territory they now serve, but will also be a stabilizing influence in banking circles throughout this section of the country. The new corporation can exercise many profitable and important functions which neither a bank nor a trust company has authority to exercise, and can take advantage of many sound and profitable opportunities frequently presented in the course of business of the two banks, but not available to them because of the restrictions upon their powers and activities." (Pl's Ex. 26, Vol. III, pp. 1163-5.)

The closing date for the acceptance of this offer by T. P. C. holders and for subscriptions to the stock of the new company, was September 19, 1929. Up to that time, the Prospectus and newspaper publications of the character of those mentioned above, contained the only information had by the public, including those persons who acquired Banco stock either by the exchange of T. P. C.'s or by purchase for cash. Neither in the Prospectus nor in the newspapers was anything said about the acquisition of stock in other banks than

those of the National Bank of Kentucky and the Louisville Trust Company, represented by T. P. C.'s.

The first public notice of the acquisition by Banco of other bank stocks appeared in the Herald Post on September 26, 1929, when mention was made of a proposal to acquire a stock holding interest in two Cincinnati banks. The District Court found that "Banco was formed for the purpose set out in the letter of July 19, 1929, and for no other purpose" (R., Vol. 1, p. 267). In the course of the trial, after hearing the testimony of a number of defendants, the Court, of its own motion, found that all other defendants in like situation would testify that "they acquired their stock in BancoKentucky Company in the belief that they were making a sound financial investment in a separate corporation, and that the BancoKentucky Company was to do the things authorized by its corporate charter, as indicated in the letter of July 19, 1929" (R., Vol. 1, p. 174).

The posture of affairs as of the closing date for deposit on T. P. C.'s and for subscriptions to Banco stock, and the results thereof are stated in Findings 21 to 24 inclusive of the District Court (R., Vol. 1, p. 255), as follows:

> "21. On September 20, 1929, the day after the closed date for deposit and subscription for Banco stock, a meeting of its Directors was held. At this meeting it was reported to the Board that as a result of the efforts of the organizers of the Company, Six hundred thousand (600,000) shares of its stock had been subscribed for at $25.00 a

share; that the deposit of T. P. C.'s for exchange was almost unanimous and the Board then reserved for exchange so as to cover all of the T. P. C.'s 1,150,000 shares of Banco stock, which, with the sale of [illegible] disposed of [illegible] shares, leaving [illegible] shares of the authorized issue undisposed of. Mr. Brown, President, asked the Board for and was granted authority to sell the [illegible] shares left at [illegible] per share.

"III. When the Board ascertained that the deposit of T. P. C.'s for exchange for Banco stock on the ratio of [illegible] shares of Banco for one participating Share was almost unanimous, it set in motion plans to amend the [illegible] Banco increasing its capital from [illegible] shares to [illegible] shares.

"IV. In January [illegible] shares which was increased from [illegible] which was [illegible]

"V. [illegible] of the Board [illegible] authorizing a contract with Black & Company and M. M. Bullock & Company for the sale of [illegible] shares of Banco stock at [illegible] per share.

In the light of subsequent events, this plan for a company having a working capital of $30,000,000 or more, in addition to a controlling interest in the National Bank of Kentucky and the Louisville Trust Company, may seem to have been a very grandiose conception. As was said by Judge Simons, writing the opinion of the Court in *Atherton* v. *Anderson*, 86 F. (2d) 518, 536:

"It is true that Banco was conceived in the vaulting imagination of the President of the bank; that it was promoted and fostered by the appellants; that the directorates of the two corporations, though not identical, over-lapped; that the great majority of trust participation certificates representing stock in the bank became the property of Banco, and that there is a suggestion of identity in the name adopted for the new company. But Banco was not a mere holding company for the bank's stock. It was organized for clearly defined purposes, too optimistically conceived, perhaps, but neither illegal or unlawful. It had its own capital with cash resources at one period almost twice the entire capital and surplus of the bank. While in the very beginning the bank stock may, as found by the court, have been its principal asset, and may have continued thereafter to be its most valuable single asset, it had other assets of very substantial value, and there was warrantable inference at the time of its organization and for a substantial period thereafter that it could well meet any assessment that might be levied upon it as a stockholder of the bank. At any rate there is nothing in the record to point to its creation for the purpose of escaping such assessment. Indeed when the assessment was finally made by the Comptroller it was enforced against Banco and not against the stockholders. See *Laurent* v. *Anderson, supra.* Its separate corporate existence was recognized by the very receiver on whose behalf we are now asked to ignore it."

* * * * *

"The BancoKentucky Company was certainly not a sham, for nearly $10,000,000 of actual cash

paid for its stock attest its reality and there is nothing in the record to point to it as an instrumentality of the bank. The master absolved the appellants of all suspicion of bad faith and the court approved his findings in the last of three carefully reasoned opinions (11 F. Supp. 9, 14). Certainly we must accept this as the deliberate judgment of the court rather than as an euphemism, easing the blow to the sensibilities as it fell heavily upon the purse."

At the time of which we are now speaking, that is, at the time of the organization of Banco, the persons who participated in its organization, who transferred their Participation Certificates for Banco stock, and in addition purchased additional stock for cash, believed and had every reason to believe that both the Bank and the Trust Company were sound. The directors of the Bank knew that some of its assets had been criticized by bank examiners, although the President of the Bank followed the practice of concealing from them the more serious criticisms. But their confidence in these two institutions was not unjustified and was supported by the knowledge that Participation Certificates having a par value of $10.00 per share, were currently selling on the market at five to one, or $50.00 a share.

The District Court found (R., Vol. 1, p. 267) that,

"There were irregularities in the handling of some of the credit accounts of the bank, but the soundness of the bank and its ability to meet its obligations could not be questioned until long after the formation of Banco."

As further evidence of the confidence of the organizers of Banco and of the public in the soundness and good faith of this new project, we would point out the fact that, whereas there had been 2,255 Participation Certificate holders, there were now (January 1, 1930) 5,660 holders of Banco shares. There were 646 Participation Certificate holders who, in addition to the Banco shares received in exchange for T. P. C.'s, purchased an additional 178,878 Banco shares for $4,471,950 in cash. There were 3,505 "outsiders" who had never held any bank stock or any Participation Certificates but who purchased 215,908 Banco shares for $5,397,700 in cash (R., Vol. 1, p. 256).

During its brief career, Banco had at its disposal cash resources amounting to $12,777,312, to-wit $9,869,650 realized from the payment of subscriptions to its stock, $1,307,662 received as dividends and interest, and $1,600,000 borrowed from the Chemical Bank of New York. The expectation of creating a working capital of $30,000,000 by the sale of additional Banco shares was defeated by the stock market crash of October 29, 1929, and the ensuing depression which made it impossible to find a market for those shares at the fixed price of $25.00 per share. Of the sum mentioned above ($12,777,312), $6,561,506 was expended in the purchase of bank stocks and the remaining $6,215,806 was practically exhausted in the following manner. In order to meet a criticism by bank examiners, the Murray Rubber Company debentures and the Humphrey note held by the Bank were purchased by Banco for $600,000 (R. 2, p. 97). Brown secretly abstracted

$2,000,000 from the treasury of Banco for his own purposes (R. 2, p. 98). In order to support the declining market for Banco shares (of which he held 60,000), Brown purchased on the market, with Banco's funds, 106,000 Banco shares at about $22.00 per share or a total outlay of $2,374,137 (R. 2, p. 99). The loss on the Murray-Humphrey purchases was total. The loss on the purchase of Banco shares was total. The loss on the "loan" to Brown of $2,000,000 was $1,557,420, or a total loss of $4,531,557.

Far from being a mere "holding company" with no other assets than bank shares, the company would and should have had sufficient cash assets remaining in its treasury to satisfy the claims of the receiver but for the tragic unfaithfulness of its chief officer in the respects above noted.

CONCLUSION.

This brings to an end this sketch of the origin, purposes and history of the BancoKentucky Company. That project was certainly not a scheme devised by a coterie of financial moguls for the monopoly or consolidation of banking power. The greatest publicity was given to the proposal. Public participation was widely invited and even solicited, with the result that $5,387,700 in cash was paid in by 3,505 "outsiders," who had held no T. P. C.'s and no Bank stock. The individual purchases of members of this group ranged from a high of 8,000 shares ($200,000), to a low of one share ($25.00). The average was about 60 shares

($1,500). Included in this group were about one thousand subscribers, none of whose purchases exceeded 50 shares per capita or a mean of 25 shares (Defendant's Ex. No. 8; R. 3, p. 37).

The motives ascribed to respondents by petitioner (Reply Brief, pp. 3-5) certainly can not have influenced the "outsiders" described above. No knowledge of the asserted condition of the Bank on their part has been shown nor is there the slightest ground for imputing such knowledge to them. They can not have had any intention of escaping double liability on Bank stock, since they were under no such liability. They can have taken no part in an alleged "reorganization" to escape income tax upon a gain from the sale of T. P. C.'s, since they had no T. P. C.'s to sell.

Five times it has been held by the courts that the BancoKentucky Company was the real owner of the bank shares represented by T. P. C.'s held by it: *Keyes* v. *American Life and Accident Insurance Company*, 1 F. Supp. 512; *Laurent* v. *Anderson*, 70 Fed. (2d) 819; *Anderson* v. *Abbott*, 32 F. Supp. 328; *BancoKentucky's Receiver* v. *National Bank of Kentucky's Receiver*, 263 Ky. 155, 92 S. W. (2d) 19; *Anderson* v. *Abbott*, 127 Fed. (2d) 696. In a sixth case, *Atherton* v. *Anderson*, 86 Fed. (2d) 537, the Circuit Court of Appeals for the Sixth Circuit reached the following conclusion:

> "But Banco was not a mere holding company for the bank's stock. It was organized for clearly defined purposes, too optimistically conceived, perhaps, but neither illegal or unlawful. It had its own capital with cash resources at one period al-

most twice the entire capital and surplus of the bank. While in the very beginning the bank stock may, as found by the court, have been its principal asset, and may have continued thereafter to be its most valuable single asset, it had other assets of very substantial value, and there was warrantable inference at the time of its organization and for a substantial period thereafter that it could well meet any assessment that might be levied upon it as a stockholder of the bank. At any rate there is nothing in the record to point to its creation for the purpose of escaping such assessment. Indeed when the assessment was finally made by the Comptroller it was enforced against Banco and not against the stockholders. See *Laurent* v. *Anderson, supra.* Its separate corporate existence was recognized by the very receiver on whose behalf we are now asked to ignore it. * * * The BancoKentucky Company was certainly not a sham, for nearly $10,000,000 of actual cash paid for its stock attest its reality and there is nothing in the record to point to it as an instrumentality of the bank. The master absolved the appellants of all suspicion of bad faith and the court approved his findings in the last of three carefully reasoned opinions (11 F. Supp. 9, 14)."

It is true that petitioner, in his Reply Brief, reasserts his claim that in the *Laurent Case* Banco was sued exclusively as the registered or "record" holder of the bank stock represented by T. P. C.'s held by it. But there is not a shred of evidence to support this claim. In point of fact, the BancoKentucky Company was not the registered holder of the stock of the Na-

tional Bank of Kentucky (Deft's Ex. No. 6). In petitioner's pleadings filed in the course of that litigation, the BancoKentucky Company was always described as the "owner" or "owner and holder," but never as the record holder, of the bank shares represented by the T. P. C.'s held by Banco.

In any event, Judge Cochran, sitting as judge of the United States District Court for the Western District of Kentucky, found that the BancoKentucky Company was "the actual and real owner" of the stock of the National Bank of Kentucky, and in affirming that judgment the Circuit Court of Appeals for the Sixth Circuit declared that the evidence showed "that Banco was in every sense the true and beneficial owner of the national bank stock involved." In addition to this we have referred to eight cases from other jurisdictions (*supra*, page 7), in which the *Laurent Case* was cited as a real owner case.

We submit that the instant case presents a situation which is totally different from that found in each of the cases where the corporate entity of a holding company was disregarded and its stockholders held liable as the real owners of the bank shares upon which a Comptroller's assessment had been levied. The plan submitted to the holders of T. P. C.'s and to the investing public provided for the acquisition by Banco of a majority of those securities and in addition a working capital of $30,000,000 which was to be used in carrying on the financial and promotional activities described in the Prospectus. If the time had been propitious so that the project could have been carried

out as planned, and if the interest of Banco had not been betrayed by its chief officer, there could be no doubt that the creditors of the National Bank of Kentucky would have been fully protected. Banco was not formed to evade the statutory liability. It was organized "for clearly defined purposes, too optimistically conceived, perhaps, but neither illegal nor unlawful." At its inception it had ample means to carry out those purposes and "to meet any assessment that might be levied upon it as a stockholder of the bank" (quotations from *Atherton* v. *Anderson, supra*). It has never been the law that a transferor of bank shares must guarantee the present or continued solvency of the transferee and the ends of justice do not require that this rule be departed from in the instant case.

The general rule, frequently announced by this Court, is that the stockholders of a corporation are not the owners of the assets of the corporation: *Klein* v. *Board of Supervisors,* 283 U. S. 19; *Cannon Manufacturing Company* v. *Cudahy Packing Company,* 267 U. S. 333; *Moline Properties, Inc., Petitioner,* v. *Commissioner of Internal Revenue,* 319 U. S. 436. Petitioner has strenuously sought to bring his case within some of the exceptions to this general rule. He first sought to show that these respondents had attempted to make a fictitious transfer of their stock to avoid impending assessment liability. As to this there was a complete failure of proof. He could prove neither that the bank was in a failing condition nor that these respondents knew it. He then attempted to show that BancoKentucky Company was a mere

sham or shell, without other assets than bank stocks and having no independent and separate purpose for existence. Here again there was a complete failure of proof. Then, as a last extremity, petitioner sought to urge that respondents, in spite of the failure to prove or demonstrate any sufficient reason, should nevertheless be termed the "real owners" of the bank stock and hence liable for the assessment. But here petitioner was met not only by an overwhelming weight of persuasive authority against him, but also by the fact that he himself had called the company, and not its stockholders, the "real owner" of the bank shares, and five decisions of State and Federal courts had followed where he led.

The ends of justice do not require a different conclusion by this Court.

The questions of *res judicata* and election have been sufficiently covered in our former brief and we shall not lengthen this supplement to that brief by further reference to these subjects.

Respectfully submitted,

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